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Via electronic mail : IFC-MIGAaccountabilityreview@worldbankgroup.org

To,

IFC-MIGA Accountability Review Team,

Subject: Comments by Indian Groups on Recommendations of External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness

After 20 years of its existence, the Compliance Advisor Ombudsman (CAO) and International Finance Corporation's (IFC) social and environmental accountability review has been initiated. This review was much needed and has come after much efforts of communities, CSO, activists who have been engaging with these institutions to seek accountability over the years. It is important that the process of review takes into consideration the demands of the community, and provides space for public participation and consultations. This Report and Recommendations of External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness makes some important recommendations as a starting point to strengthen the accountability process but building a robust and accountable system will require more radical changes.

As Civil Society Organisations and people's movements from India, we want to emphasize the need for an accountability mechanism which has justice, rights-based framework and empowerment of communities at the core. Anything less would be unacceptable and would be against the principles of and purpose for an accountability mechanism. Despite communities having protested the large scale environmental and social destruction caused by the projects, IFC has over the years failed to comply with its own environmental and social performance standards in projects they finance. IFC financed West Coast Paper Mills in Dandeli¹ in 2002 where despite the local opposition and ignoring widespread pollution IFC went ahead with the project financing. In the Tata Mundra project² which caused the destruction of marine ecology and destroyed the livelihood of thousands of fishworkers, despite protests from impacted communities and

¹ Karnataka's West Coast Paper Mill had to deal with much more than shareholders on the day of its recent Annual General Meeting; India Together; Bhargavi Rao; <http://www.indiatogether.org/wcpmmeet-environment>

² Tata Mundra Ultra Mega Power Project: A decade of disemPOWERing communities
<https://www.cenfa.org/projects-in-focus/tata-mundra-ultra-mega-project/tata-mundra-ultra-mega-power-project-a-decade-of-disempowering-communities/>

a complaint filed with CAO almost a decade ago, the situation on ground has only turned worse. In GMR Kamalanga Project³ which displaced thousands of people and destroyed the livelihood of communities after seven years of filing complaint with the CAO, affected communities continue to suffer. In the Allain Duhangan project⁴, a run-of-river hydroelectric power plant financed by IFC, communities filed a complaint with CAO regarding the environmental and social damage, the CAO failed to address the core issues in the recommendations even though these were discussed in the CAO report. Experiences of these and many other cases have established IFC's failure of compliance as well as raises the question of their intent to do so. Even the accountability process has been marred by overriding powers of the management to take the calls. Unless the review process addresses these core issues, the process will hardly benefit the people who are impacted by IFC's investments.

Our Comments and Recommendations:

On Litigation:

In section 4 of “recent litigation and evolving judicial decisions and implications for IFC/MIGA/CAO and environmental and social accountability” the report particularly refers to the JamV IFC case to make its point that the case has altered litigation risk for IFC (and other international financial institutions). The report further comments that “CAO should be mindful of the ‘unintended consequences’ of its compliance processes. Without derogating from (indeed, arguably enhancing) their efficacy, caution and a higher degree of collaboration are called for to guard against CAO’s efforts being “hijacked” to advance agendas that are beyond CAO’s remit”. These comments seem to absolutely undermine the serious implications of failure of non-compliance of E&S performance standards by IFC on communities and the need for having an unbiased and independent accountability mechanism.

The *Jam V IFC* litigation was not filed out of a collateral purpose of IFC's compliance function but because of failure of the accountability process to provide any just resolution to the community grievances which were recognized by the CAO in its audit report. It was a legal and necessary recourse when the institution repeatedly failed to

³ <https://www.cenfa.org/projects-in-focus/gmr-kamalanga-energy-limited/>

⁴ In relation to the CAO's response to a complaint on the IFC-financed Allain Duhangan hydroelectric dam in India, local NGOs assert that the CAO was biased in favour of the IFC and the company. Himanshu Thakkar, coordinator of the South Asia Network on Dams, Rivers & People added “the CAO office dealt with the issue with a pro-IFC and pro-developer bias”, and failed to “address the core issues in the recommendations even though these were discussed in the report”; <https://www.brettonwoodsproject.org/2006/01/art-507739/>

deliver remedy and address significant grievances. The fact that the complaint was filed in 2011 and in 2020 is still in its monitoring phase with every monitoring report pointing towards failure to deliver on the action plan, communities will definitely use any legal process to seek justice. Litigation is not the intent but an offshoot of inaction and injustice.

In 2011 a complaint⁵ was filed by fishworkers of Mundra, India to CAO regarding the environmental and social impacts of the Tata Mundra Project. After the complaint, an compliance audit was done which reinforced the serious environmental and social impacts of the project. The major findings of the CAO audit report clearly stated the failure/ lapses in IFC assessment and compliance of Environmental and social standards.

The response of the IFC management to these findings was rebutting all the findings of CAO and going out of the way to defend its client, CGPL and its parent company, Tata Power and put its own credibility and the credibility of its accountability mechanism at risk. The action plan devised by the IFC nowhere reflected the seriousness of the CAO audit report and was limited to bandage work. The so-called action plan was merely commissioning of studies on marine impact, ambient air quality, health status and need survey, household level socio-economic survey of 21 villages/hamlets including seasonal settlements in CGPL's influence area, and undertaking the environment and social impact assessment for the expansion project. Today, nine years after the initiation of the process, the outcomes of the studies are not shared with the communities despite repeated requests and hence, no proper action plan is implemented.

The recommendation that "CAO's Compliance function should continue to fulfil its mandate to identify IFC/MIGA non-compliance, while being attentive in its use of language to the possibility that non-compliance findings and assertions of factual conclusions could be used for collateral purposes (including to support litigation against IFC/MIGA), and exercise restraint accordingly" is rather appalling.

The fact that the CAO's compliance function is burdened with the onus of protecting IFC/MIGA from litigation is outrightly making the independence of CAO questionable. The role of CAO should not be to worry about the litigation risks but to provide its compliance function based on facts and findings and calling out the failures and non-compliance, wherever it has happened. This should not be compromised in any

⁵ http://www.cao-ombudsman.org/cases/case_detail.aspx?id=165

way. If these non-compliances lead to litigation it is for the IFC to consider and deliver better on their performance standards. Compromising on the language for the risk of litigating will fail the process of compliance, its genuineness and credibility apart from the question of independence of the CAO.

On Dispute Resolution (DR):

1. Another critical area of concern is the process of dispute resolution /GRS which inherently disempowers communities. This process just adds layers of complexity in the process of accountability. DR and compliance are two different processes. 'Settling' a dispute between a company and community does not entail correcting the non-compliance of policies. The investigation of non-compliance is to fix non-compliance. One process should not nullify the other. And the communities should have a choice whether to avail one or both the processes.
2. Monitoring of DR agreements should not rest with the management. In cases of failure by the Bank/project proponent to implement in a timely manner, CAO should have powers to take punitive and exemplary action against them.
3. The basic parameters for an effective DR process should have communities at the forefront. In most cases where communities file a case with the CAO, communities are in a disadvantageous position of being negatively impacted by the project and in most cases with little agency to ensure security of their rights. The process should provide them a genuine, safe, and equal opportunity to have a fair resolution process.
4. To ensure this it is essential to recognize the role of CSOs (who are acceptable to the community) in the advisory capacity, but not to represent the community. They can be part of the facilitated dialogue and be in the room to provide real-time advice to complainants but have no deciding power. It is important to recognize the IFC clients or the companies are at an advantage in terms of understanding the process which the community might be in. By bringing in CSOs in an advisory capacity, the DR process will move towards providing a level playing field for both the parties.
5. It is also essential that CAO needs to be cautious in hiring external consultants who lack sensitivity to political dynamics and nuances of unequal power relations. Their background and technical expertise should match the unique condition and needs of the case. This becomes even more critical in conflict

areas and in complex societies with fragmented and hierarchical social structures.

On Remedy:

1. We need to see that in addition there is space for communities to be a part of the remedial action plan. In both the cases of Tata Mundra and GMR Kamalang from India the communities rejected the action plan that was unilaterally decided by the management. The remedial action plan needs to have the participation of communities and CAO. Despite the fact that CAO validated the concerns of the community the action plans were hardly reflective of the findings of the report. The absence of community participation and agreement on the action plan will only lead to failure and a lopsided process that neither provides the community any remedy nor represents accountable processes.
2. Affected communities need to be at the core of the accountability process. They should have access to all studies/documents emerging out of the review process, and they should be part of an independent monitoring team to monitor the progress of implementation of the action plans. CAO should have powers not only to report the violations but also to fix responsibility on erring Bank officials.

On eligibility:

1. The recommendation that “CAO should change the eligibility criteria so that complaints are not eligible until investments are approved by the Board” is problematic. This snatches from people the opportunity to reach out to the accountability mechanism highlighting the environmental and social concerns which could help in the IFC not invest in a problematic project. Once a problematic project gets approval from the Board, the community has lost very critical time especially in Category A projects where environmental and social concerns are critical. The complaint should be eligible any time after the project is in pipeline.

Other Important recommendations:

1. Also, another critical recommendation from civil society is that the CAO should have *suo moto* powers to investigate problem projects. The onus of identifying IFC's lending to a particular project, understanding the performance standards, knowing about the existence of CAO, and developing a complaint in a manner acceptable to CAO is on affected communities. This structure disempowers the communities for they are never consulted in advance with full disclosure of impacts, lenders and of compensation/rehabilitation for their losses in most of the projects. Hence in projects, CAO has knowledge about severe consequences, it should have the powers to take *suo moto* investigation as well as actions. Particularly in cases of Category A projects that have potential high risks, the CAO should proactively look out for the involvement of the potentially affected communities and facilitate their observations/complaints.
2. We want to reiterate that CAO should have recommendatory powers beyond its role of reporting violations of in a project. CAO should have powers to recommend a moratorium on work until such compliances are ensured. It is important for the reform process to keep the communities at the center of the process and ensure the independence of the CAO and above all, provide communities with a genuine and strengthened accountability mechanism.
3. The process of dispute resolution, compliance and remedy need to be done in a time bound manner. The experiences of communities in India has shown the failures of CAO to conduct processes timely. The Tata Mundra case and the GMR Kamalanga cases have been in the monitoring stage for close to 5 years with hardly any progress on basic action plans. The process has caused communities

The most significant aspects of the review process are its intent and effective implementation of the policies. The objective of the reform process should be to strengthen communities and to hold institutions accountable. Any provisions that dilute the powers and independence of CAO will leave these processes meaningless. Also, the process of review should have adequate space for feedback and consultation with the CSOs and communities, if we want a progressive, strengthened and meaningful accountability mechanism.

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